P v S

HIGH COURT (IPOH) — DIVORCE PETITION NO 33–144–04 OF 2014
NOORIN BADARUDDIN JC
14 AUGUST 2014

Family Law — Divorce — Petition — Application for dissolution of marriage by husband — Objection by wife who wanted reconciliation — Whether husband had reasonable cause of action to apply for petition — Whether abuse of process of court — Whether matrimonial difficulty referred to conciliatory body first — Whether there were exceptional circumstances which made reference to conciliatory body impracticable — Law Reform (Marriage and Divorce) Act 1976 s 106(1) — Rules of Court 2012 O 18 r 19(1)(a) & (d)

The petitioner (husband) and the respondent (wife) were married and had a child. The petitioner petitioned for dissolution of the marriage with the respondent but the respondent applied for the petition to be struck off under O 18 r 19(1)(a) or (d) of the Rules of Court 2012 on the ground that the cause of action was unreasonable as the petition was said to be an abuse of process of the court. The respondent objected to the petition on the ground that the matrimonial difficulty was not first referred to a conciliatory body constituted under the s 106 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The respondent had informed the petitioner that she never wanted to have the marriage dissolved as she would want to discuss their marital problems but there was no reply by the petitioner. The petitioner submitted that there were exceptional circumstances provided in s 106(1) of the Act and their matrimonial difficulty should not be referred to any conciliatory body. The petitioner believed their marriage had irretrievably broken down and that reference to a conciliatory body would be impracticable and futile and a waste of time and unnecessary pressure to him. The issue that arose was whether there were exceptional circumstances which made reference to a conciliatory body impracticable thus exempting the petitioner from referring his matrimonial difficulty to a conciliatory body.

Held, allowing the application by the respondent:

(1) It was obvious that the petitioner vehemently wanted the marriage to end but the petitioner failed to establish the special circumstances arising from his marital difficulties that warranted the court to grant the divorce. Reference to a conciliatory body would not be impracticable as the respondent still wanted an opportunity to be given to her to reconcile. Even though the petitioner is no longer interested with the marriage, that

should not be a reason to deprive the respondent from the opportunity to be heard as to how she wanted to reconcile before the conciliatory body (see para 14 & 25).

(2) Both petitioner and respondent are considered young and were highly educated. They are both professionals. They can still sit and discuss their marital difficulties before a conciliatory body and state their views and suggestions as to how to solve their marital problems amicably and professionally. If they still fail to come to a settlement, then and only then can it be said that their marriage has irretrievably broken down. The conciliatory body can then issue a certificate to state as such (see para 27).

(3) Apart from the respondent's desire to reconcile, there was the welfare of a young child involve in this matter. This fact should be the primary concern of both petitioner and respondent. The child could also be a contributing factor to a settlement of the marital dispute. It might not be but the opportunity to overcome their marital difficulties must be given in the interest of justice to all parties involve, not only to the petitioner albeit his refusal but at the very least, to the respondent and their young child (see para 28).

[Bahasa Malaysia summary

Pempetisyen (suami) dan responden (isteri) berkahwin dan mempunyai seorang anak. Pempetisyen membuat petisyen untuk pembubaran perkahwinan dengan responden tetapi responden memohon untuk petisyen dibatalkan di bawah A 18 k 19(1)(a) atau (d) Kaedah-Kaedah Mahkamah 2012 atas alasan bahawa kausa tindakan adalah tidak munasabah memandangkan petisyen dikatakan penyalahgunaan proses mahkamah. Responden membantah kepada petisyen atas alasan bahawa masalah perkahwinan tidak dahulu dirujuk kepada badan berdamai yang dibentuk di bawah s 106 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta'). Responden telah memberitahu pempetisyen bahawa dia tidak pernah menginginkan perkahwinan dibubarkan kerana dia ingin untuk berbincang masalah perkahwinan mereka tetapi tiada jawapan daripada pempetisyen. Pempetisyen berhujah bahawa terdapat keadaan luar biasa yang diperuntukkan di dalam s 106(1) Akta dan masalah perkahwinan mereka tidak patut dirujukkan kepada mana-mana badan berdamai. Pempetisyen mempercayai yang perkahwinan mereka telah hancur berkecai dan bahawa rujukan kepada badan berdamai akan menjadi tidak praktikal dan sia-sia dan membazirkan masa dan tekanan tidak perlu kepadanya. Isu yang berbangkit adalah sama ada terdapat keadaan luar biasa yang membuatkan rujukan kepada badan berdamai tidak praktikal dengan itu mengecualikan pempetisyen daripada merujuk masalah perkahwinannya kepada badan berdamai.

Diputuskan, membenarkan permohonan oleh responden:

(1) Adalah jelas bahawa pempetisyen bersungguh-sungguh hendak perkahwinan tamat tetapi pempetisyen gagal untuk membuktikan keadaan khas berbangkit daripada masalah perkahwinan yang mewajarkan mahkamah membenarkan perceraian. Rujukan kepada badan berdamai tidak akan menjadi tidak praktikal kerana responden masih hendak peluang diberikan kepadanya untuk berdamai. Walaupun pempetisyen tidak lagi berminat dengan perkahwinan, ia bukan menjadi alasan untuk menafikan responden daripada peluang untuk didengar bagaimana dia hendak berdamai di hadapan badan berdamai (lihat perenggan 14 & 25).

(2) Kedua-dua pempetisyen dan responden boleh dikatakan muda dan berpelajaran tinggi. Kedua-dua mereka adalah profesional. Mereka boleh duduk dan berbincang masalah perkahwinan mereka di hadapan badan berdamai dan menyatakan pandangan dan cadangan mereka bagaimana hendak menyelesaikan masalah perkahwinan secara persahabatan dan profesional. Jika mereka masih gagal untuk mencapai penyelesaian, hanya pada masa tersebut boleh dikatakan yang perkahwinan mereka telah hancur berkecai. Badan berdamai pada masa itu boleh mengeluarkan sijil untuk menyatakan sedemikian (lihat perenggan 27).

(3) Selain daripada keinginan responden untuk berdamai, terdapat kebajikan anak kecil yang terlibat dalam perkara ini. Fakta ini patut menjadi perhatian utama oleh kedua-dua pempetisyen dan responden. Kanak-kanak ini juga boleh menjadi faktor sumbangan kepada penyelesaian terhadap pertikaian perkahwinan. Ia mungkin tidak tetapi peluang untuk mengatasi masalah perkahwinan mereka mesti diberikan dalam kepentingan keadilan kepada kesemua pihak yang terlibat, bukan sahaja kepada pempetisyen meskipun penolakannya tetapi sekurang-kurangnya, kepada responden dan anak kecil mereka (lihat perenggan 28).]

Notes

For cases on petition, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 4287–4296.

Cases referred to

Bowman v Bowman [1949] 2 All ER 127, CA (refd)
C v A [1998] 6 MLJ 222; [1998] 4 CLJ 38, HC (refd)
Fay v Fay [1982] 2 All ER 922, HL (refd)
Hillier v Hillier and Latham [1958] 2 All ER 261, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 51, 52, 57(2), 106, 106(1)
Rules of Court 2012 O 18 r 19(1)(a), (d)

Noorin Badaruddin JC:

[1] The petitioner ('the husband') and the respondent ('the wife') were married on 11 July 2008 and have a child, born on 7 May 2012. After the marriage they lived at their matrimonial home at suite 1203A, Casmila Tower Condominium, Jalan Bukit Idaman 3/1, Bukit Idaman, 68100 Batu Caves Selangor from 31 January 2009–8 August 2009. According to the petitioner in his petition, the respondent suddenly left their matrimonial home without any specific reasons. After they had some discussions with the family, the respondent returned to their matrimonial home on 13 December 2010. During that period, the respondent conceived their child. Thereafter, the respondent had requested for a transfer from Kuala Lumpur to Penang and according to the petitioner this was done without his knowledge. The respondent left their matrimonial home during her pregnancy and resided in Penang until now. The petitioner petitioned for dissolution of the marriage with the respondent on 15 April 2014.

[2] The respondent by way of notice of application dated 8 May 2014 applied for the petition to be struck off under O 18 r 19(1)(a) or (d) of the Rules of Court 2012 on the ground that the cause of action was unreasonable as the petition is said to be an abuse of process of the court.

[3] The respondent objected to the petition on the ground that as the matrimonial difficulty was not first referred to a conciliatory body constituted under the Law Reform (Marriage and Divorce) Act 1976 ('the Act') there was non-compliance with s 106 of the Act. It was stated that there was no attempt of reconciliation before a marriage tribunal and that the requirement under the said s 106 is mandatory.

[4] The respondent through her solicitor had written in to the solicitor for the petitioner stating that she never wanted to have the marriage dissolved as she would want to discuss their marital problems. Unfortunately, there was no reply by the petitioner.

[5] The petitioner submitted that there are exceptional circumstances as provided in s 106(1) of the Act and their matrimonial difficulty should not be referred to any conciliatory body. It was submitted that the petitioner believe their marriage had irretrievably broken down and that reference to a conciliatory body would be impracticable and futile. The petitioner also stated in his affidavit of 20 June 2014 that reference to a marriage tribunal would be a waste of time and unnecessary pressure to him. The petitioner would want the divorce soonest as he would like to concentrate on pursuing his ambition to further his studies.

[6] Both the parties had filed their affidavits. The court finds they have complied with the necessary requirements for this court to make a findings whether there are exceptional circumstances in this matter.

CASE FOR THE RESPONDENT

[7] The counsel for the respondent submitted that the petition of 15 April 2014 ('the petition') is wrong in law as it did not comply with the requirement of s 106(1) of the Act due to the fact that there was no attempt of reconciliation before a marriage tribunal. The counsel submitted that the requirement for any matrimonial difficulty to be first referred to a conciliatory body before a divorce petition be made is mandatory.

Section 106 of the Act states:

> Requirement of reference to conciliatory body before petition for divorce
>
> 106(1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonialdifficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:
>
> Provided that this requirement shall not apply in any case —
>
> (i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;
>
> (ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;
>
> (iii) where the respondent has been required to appear beforea conciliatory body and has wilfully failed to attend;
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> (iv) where the respondent is imprisoned for a term of five years or more;
>
> (v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or
>
> (vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.
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> (2) A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties but, where they are unable to agree on a conciliatory body, shall be referred to the marriage tribunal for the area in which they reside or, where they are living in different areas, to the marriage tribunal for the area in which they had last resided together.
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> (3) A 'conciliatory body' means —
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> (a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association;
>
> (b) a marriage tribunal; or
>
> (c) any other body approved as such by the Minister by notice in the Gazette.

(4) A marriage tribunal shall be set up for such specified area or district as the Minister may decide, consisting of a Chairman and not less than two nor more than four other members who shall be nominated by the Minister, or by such officer to whom the Minister may have delegated his powers to in that behalf.

(5)(a) A conciliatory body to which a matrimonial difficulty has been referred shall resolve it within the period of six months from the date of reference; and shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(b) If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations asit thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage.

(c) No advocate or solicitor shall appear or act as such for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

[8] It was further submitted by the counsel for the respondent that the intention of the parliament in introducing s 106 of the Act is to ensure that problems between married couples be first referred to a marriage tribunal unless the matter falls under ss 51 and 52 of the Act. The tribunal will have to resolve the matrimonial difficulty within the period of six months from the date of reference. The parties will be called so as to give them the opportunity for their problems to be heard. This mandatory requirement must be complied with and that litigants should not be allowed to do things according to their whims and fancy.

[9] The counsel for the respondent also argued that the matter before this court does not fall under the exception of the said s 106 as the matrimonial difficulty between both parties are normal problems in many marriages which can be resolved by a conciliatory body. It was also submitted that from the petitioner's pleadings it can be gleaned that the petitioner are looking for the fastest way to end the marriage with the respondent.

[10] The counsel for the respondent submitted that as the cause of action by the petitioner is made without first referring to the marriage tribunal, it is an abuse process of the court. The counsel for the respondent also stated that the said cause of action can only arise once a certificate that the conciliatory body is unable to resolve the matrimonial difficulty is issued. The said counsel further argued that in the interest of justice, the respondent must be given the opportunity to reconcile with the petitioner through the conciliatory body. Reference to the marriage tribunal according to the respondent's counsel will

not cause any injustice or abuse process of the court. In fact, if the conciliation process in the tribunal failed it will strengthened the reasons that the marriage has irretrievably broken down. The petitioner's petition and supporting affidavit failed to disclose what steps had been taken to effect a reconciliation pursuant to s 57(2) of the Act.

CASE FOR THE PETITIONER

[11] The petitioner stated that the marriage has irretrievably broken down. The counsel for the petitioner submitted that since the respondent left their matrimonial home and lived in Penang, the respondent had never returned to him. The petitioner tried to reconcile but due to the egoistic behaviour of the respondent, the petitioner is disheartened and refuse to accept the respondent anymore. The petitioner claimed that the respondent frequently caused unnecessary disputes and had once attempted to humiliate the petitioner at his work place.

[12] The petitioner admitted that he used to frequently sleep at the hospital's hostel where he is working and refused to return home as the respondent's behaviour was not to his likings. According to the petitioner, it was the respondent's actions or inactions that made their marriage a failure. It is clear from the affidavits and the submission by the petitioner's counsel, the petitioner no longer wants to be with the respondent.

[13] The respondent refused to refer their matrimonial difficulty to the conciliatory body for it will only be a waste of time and futile. Further, the petitioner is tight up with his work commitment at the National Heart Institute in Kuala Lumpur and presently is furthering his studies. He could not see his child for a longer time due to his busy schedules and the obstacles caused by the respondent herself. In short, the petitioner is saying that reference to a marriage tribunal would be impractical.

FINDING OF THE COURT

[14] In considering and evaluating the petition and the affidavits of both parties, this court finds that both parties obviously are blaming each other for the marital disputes or difficulties. It is also obvious that the petitioner vehemently wants the marriage to end.

[15] Therefore, the court is now put to consider one main issue ie whether there are exceptional circumstances which make reference to a conciliatory body impracticable thus exempting the petitioner from referring his matrimonial difficulty to a conciliatory body.

[16] This court is mindful that the purpose of s 160 of the Act is to promote reconciliation so as to control impetuous and hasty resort by spouses to end their marriage.

[17] In the case of *C v A* [1998] 6 MLJ 222; [1998] 4 CLJ 38, RK Nathan J laid down the background of the reason for the introduction of s 106. His Lordship stated at p 227 (MLJ); p 42 (CLJ):

> *Reason for the introduction of s 106*
>
> *The Royal Commission*
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> A Royal Commission was set up before the amendment of the Act to look into various issues relating to the marriage and divorce laws of non-Muslims. Its report called 'Report of the Royal Commission on Non-Muslim Marriages and Divorce Laws' was dated 15 November 1971 ('the report'). I shall confine my review of the report to issues related to s 106 of the Act. Whilst recommending that marriages ought to be dissolved under circumstances which make it 'just and reasonable' and that enquiries should be made by the court into facts to satisfy itself that the marriage had indeed irretrievably broken down, the report also recommended:
>
> that attempts at reconciliation be made before the filing of any petition for divorce and that proceedings in court may be adjourned at any stage and for such period as the court thinks fit, to encourage reconciliation;
>
> In relation to the reconciliation aspect of its report the commission was of the view that since in Christian churches and communal bodies among Chinese and Hindus there are respected elders whose words are listened to with respect, their services together with that of justices of peace may be utilised for the setting up of conciliation councils.

[18] The learned High Court judge (as he then was) further cited the *Denning Report* which stated that reconciliation should be attempted in every case where there is prospect of success. The learned High Court judge stated:

> *The Denning Report*
>
> With a view to promoting reconciliation for saving marriages and being part of a rhetoric of divorce reform the United Kingdom Government established a committee headed by Mr. Justice Denning (as he then was). The Denning Report (as it was called) recommended that 'reconciliation should be attempted in every case where there is a prospect of success' (see Cmd 7024, para 3).

[19] Further, the learned High Court judge explained the intention of s 106 of the Act:

> Intention of s 106
>
> It is obvious that the purpose and intent of s 106 is to reconcile parties where there is a reasonable probability of a reconciliation. In fact s 106(5)(b) of the Act provides that together with the certificate it issues, the conciliatory body can make recommendations regarding maintenance, division of matrimonial property and

> the custody of the minor children, if any, of the marriage. In other words it is apparent that the elders of the religion, community, clan or association (see s 106(3)(a) of the Act) who might be even familiar with the parties and their situation in life could therefore make recommendation for the preservation of the property and the welfare of the minor children. I have also to consider if there is any wilful refusal to refer to a conciliatory body. I have also to consider whether the parties are young and whether it is appropriate to write off their prospects of reconciliation as hopeless and whether the guidance of the conciliatory body which oft times has proven valuable in promoting a stable and satisfactory reconciliation, would prove beneficial to this case.

[20] What then constitute 'exceptional circumstances'? This court is guided by reported cases and realised that the decision on what is or is not exceptional circumstances is subjective and a judge at the first instance should make a subjective evaluation and decide whether the circumstances are out of the ordinary.

[21] In the case of *Fay v Fay* [1982] 2 All ER 922, the House of Lords explained:

> Parliament deliberately intended that the decision on what is or is not exceptional hardship or depravity in a particular case should be a matter for the judge at first instance to decide by making his own subjective value judgment as to whether the hardship or depravity was out of the ordinary, when judged by prevailing standards of acceptable behaviour between spouses and after taking into account of all relevant circumstances.

[22] Cases such as *Bowman v Bowman* [1949] 2 All ER 127 and *Hillier v Hillier and Latham* [1958] 2 All ER 261 highlighted the instances of adultery committed by one parties in the suits to be circumstances out of the ordinary that justify the termination of the marriage.

[23] In the case of *C v A* which was cited by both parties in their submissions is also a case which warrants the marriage of the parties to be dissolved. In that case, the very fact that both parties had lived apart with no contact with one another for well over 20 years is considered to be prima facie evidence that each of them is entitled to a dissolution of the marriage which to the mind of the learned High Court judge has been in name only and not in substance, in law only yet not in fact. In this case, the learned High Court judge was also of the considered view that there is no cause for concern in so far as the children are concerned as both their children are of 29 and 25 years old respectively. In other words the prayer in this case was for dissolution simpliciter.

[24] It is also important to highlight that in the case of *C v A*, attempts had been made at reconciliation and that neither party had shown any desire towards the continuance of the union and that there are no infant children

involved to motivate a desire for the continuance of the marriage and the learned High Court judge found that all these factors clearly show exceptional circumstances, falling within the proviso (vi) to s 106 of the Act.

[25] After taking into account the objective of s 106 and the cases above that illustrate the 'exceptional circumstances'. including analysing the affidavits of both parties, this court is of the considered view that the petitioner has failed to establish the special circumstances arising from his marital difficulties that warrant this court to grant the divorce. This court is of the view that even though the petitioner claimed that any effort to refer their marital difficulties to a conciliatory body would be a futile effort and a waste of time, this court is of the opposite view. Reference to a conciliatory body would not be impracticable as the respondent still wants an opportunity to be given to her to reconcile. True that the petitioner is no longer interested with the marriage but, that stand taken by the petitioner should not be a reason to deprive the respondent from the opportunity to be heard as to how she wants to reconcile before the conciliatory body.

[26] This court further finds that there was a time when both parties did reconcile through the assistance of the respondent's brother and this, the court is of the view that by referring to a conciliatory body, family members of both parties could be invited to assist in solving their marital difficulties. As it is, nowhere in the petitioner's affidavit revealed that he had consulted or sought the assistance of his family members or anyone to assist him in solving his marital difficulties or to reconcile.The opportunity must be afforded to both family members to advise them accordingly and this court is of the view that by referring to the conciliatory body, that opportunity can be given.

[27] Both petitioner and respondent are considered young and they are highly educated. They are both professionals. This court is of the view that both of them can still sit and discuss their marital difficulties before a conciliatory body and state their views and suggestions as to how to solve their marital problems amicably and professionally. If they still fail to come to a settlement, then and only then can it be said that their marriage has irretrievably broken down. The conciliatory body can then issue a certificate to state as such.

[28] The most important consideration that this court took into account is that apart from the fact that the respondent has the desire to reconcile, there is the welfare of a young child involve in this matter. Both parties have a young child. This fact should be the primary concern of both petitioner and respondent. The child could also be a contributing factor to a settlement of the marital dispute. It may not be, but nevertheless the opportunity to overcome

their marital difficulties must be given in the interest of justice to all parties involve, not only to the petitioner albeit his refusal, but at the very least to the respondent and their young child.

[29] I therefore allow the application filed by the respondent by way of notice of application dated 8 May 2014 and that the petition filed by the petitioner dated 15 April 2014 be struck off.

Cost of RM5000, to be borne by the petitioner.

Application by respondent allowed.

Reported by Afiq Mohamad Noor